Supreme Court, U. S.
F I L E D
OCT 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-569

ALLIED CONTRACTORS, INC.

v.

TOWN OF FEDERALSBURG, MARYLAND

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF MARYLAND

DAVID AARONSON
Counsel for Petitioner
Rm. 201 -A, Myers Bldg.
American University Law School
Washington, D. C.

(202) 656-5566

INDEX

Opinion Below 1

Jursidiction 1

Questions Presented 2

Constitutional Provisions Involved 3

Statement of the Case 3

Substantial Federal Questions Raised 6

Reasons for Granting the Writ 8

Conclusion 52

Certificate of Service 53

Appendix . . . . . .

Text of Opinion and Judgment of the Court of Appeals of Maryland . . . . . .

Text of The Ruling on Limitations by the Circuit Court for Queen Anne's County . . . . . .

Text of Petitioner's Motion for a Reargument . . . . . .

Text of Clerk's Notice of Denial.

CITATIONS

Cases:

American Cyanamid Co. v. F.T.C., 363 F.2d 757.....13

Brosius v. City of Hagerstown, 237 Md. 374 46

Burroughs Int'l. Co. v. Datronics Eng.,Inc., 254 Md. 327 37

Burton v. Wilmington Parking Author., 365 U.S. 715 10

Dewey Jordan v. Md. Nat. Cap. Park and Planning Comm., 258 Md. 490.....17,19,20,21,23,50

Dillon Properties,Inc. v. Minmar Builders,Inc., 257 Md. 274 20

Doughty v. Bayne, 222 Md. 361 46

Evans v. Newton, 382 U.S. 296 10

Ex Parte Virginia, 100 U.S. 339 10

Federalsburg v. Allied Contractors,Inc, 275 Md. 151 1

CITATIONS

Friosoen v. Trapp,
258 Md. 629 28

General Petroleum Corp. v. Seaboard Terminals Corp.,
23 F. Supp. 137 29

Gildenhorn v. Columbia R.E. Titles,
271 Md. 387 29

Griffiths v. U.S.,
74 Ct. Cls. 245 15

Hall v. Barlow,
260 Md. 327 46

J.D. Hedin Construction Co. v. U.S.,
347 F.2d 235 18

Henry v. Mississippi,
379 U.S. 443 49

Herb v. Piticairn,
324 U.S. 117 49

Johnson v. State,
238 Md. 643 37

Kerr v. Enoch Pratt Free Library,
149 F.2d 212 10

Levin v. Friedman,
271 Md. 438 29

CITATIONS

Liller v. Logsdon,
261 Md. 367 28

Loburnum Const. Corp. v. U.S.,
325 F. 2d 451 18

McCord v. U.S. ,
9 Ct. Cls. 155 15

McNulty v. Medical Service of D.C.,Inc.,
176 A.2d 783 34

Mettee v. Boone,
251 Md. 332 46

Moran Bros. Co., v. U.S.,
61 Ct. Cls. 73 15

N.A.A.C.P. v. Alabama,
357 U.S. 449 50

New Orleans Waterworks v. La. Sugar Refinery Co.,
125 U.S. 18 50

Pearl Homing Co. v. Linthicum,
112 Md. 27 35

Pillsbury Co. v. F.T.C.,
354 F. 2d 952 13

Rockwell v. Capital Traction Co.,
25 U.S. App. 98 34

CITATIONS

Shelley v. Kraemer,
334 U.S. 1 10

Slaughter-House Cases,
21 L. Ed. 394 8

State, Use of Gilkeson v. Humbird,
54 Md. 327 35

Staub v. City of Baxley,
355 U.S. 313 50

Stroller v. Cowan,
7 G.&J. 284 34

Swift v. U.S.,
14 Ct. Cls. 208 15

Texaco v. F.T.C.,
336 F.2d 754 13

Tuney v. Ohio,
273 U.S. 510 13

U.S. v. Rice,
317 U.S. 61 15,23

U.S. v. Spearin ,
248 U.S. 132 18

Weaver v. State,
226 Md. 431 37

W. B. & A. Elec. R.R. Co. v. Moss,
130 Md. 198 4

CITATIONS

Yick Wo v. Hopkins,
118 U.S. 356 26

STATUTES

Section 5-102(a)(5), Ann. C. Md., Cts.&
Jud. Proc. Art. 27

MARYLAND RULES OF PROCEDURE

Maryland Rule 886 27,36

LAW REVIEW ARTICLES

32 Geo. Wash L. Rev. 65 16

35 Geo. Wash L. Rev. 908,
"The Changes Clause in Federal
Construction Contracts. "..... 15

Index (con't.)

Constitution

Constitution of the United States:

Amendment Article XIV,
Section 1 2,3,8,9,50

Article I, Section 10, "Contract".... 21

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

_____

No. _____

_____

ALLIED CONTRACTORS, INC.,
Petitioner

v.

TOWN OF FEDERALSBURG,
Respondent

_____

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF MARYLAND

_____

Petitioner Allied Contractors, Inc. respectfully prays that a writ of certiorari issue to review the opinion and judgement of the Court of Appeals of the State of Maryland, denying a Motion for Reargument on July 16, 1975

Opinion Below

The opinion of the Court of Appeals of Maryland appears at 275 Md. 151, and is reproduced in the Appendix to this petition, along with the Clerk's Notice of the denial of Petitioner's Motion for a reargument. Said Motion is also set forth as an Exhibit in the Appendix hereto.

Jurisdiction

The judgement of the Court of Appeals of Maryland was entered on

July 17, 1975, overruling Petitioner's Motion for a Reargument. This petition has been filed within 90 days of that date. The jurisdiction of this Court is invoked under the review provisions of 28 U.S.C. S1257(3).

Questions Presented

1. Did the Court of Appeals of Maryland deny Petitioner due process of law by reversing part of Petitioner's jury award to the extent of $57,516.42 out of $74,022.66 in violation of the 14th Amendment to the United States' Constitution?

2. Did the Court of Appeals of Maryland deny Petitioner the equal protection of the law by reversing part of Petitioner's jury award to the extent of $57,516.42 out of $74,022.66 in violation of the 14th Amendment to the U.S. Constitution?

Constitutional Provisions Involved

Constitution of the United States of America:

Amendment Article XIV, Section 1

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner sued the Town of Federalsburg for $74,022.66 on March 2, 1972 for various breaches of a public

works construction contract dated August 6, 1975 , concerning repairs to a bridge over the Marshyhope Creek. Petitioner was awarded $74,022.66 by a jury of 12 citizens in the Circuit Court of Queen Anne's County. The question of limitations was litigated as a preliminary matter before the Court, which ruled against the defense of limitations in a written ruling dated July 11, 1973, a copy of which is attached hereto.

Respondent elected not to submit the factual issues with respect to limitations to the jury, thereby waiving respondent's right to dispute the preliminary findings of fact which formed the basis of the trial Judge's ruling on limitations.[1] Despite the aforesaid voluntary and knowing waiver, respondent

1. W.,B. &A. Elec. R.R. Co.v. Moss, 130 Md. 198, 100 A. 86 (1917).

found it possible to relitigate the factual questions regarding limitations in the Court of Appeals of Maryland, where Respondent's lawyer on this case was then sitting as one of the seven Judges, and to whom Respondent's agents routinely addressed correspondence, admitted as exhibits in this matter, prior to and apparently during the progress of this litigation.

Petitioner's award was overturned in part in an opinion dated June 3, 1975, attached hereto as an Appendix exhibit. Petitioner then sought a Reargument before the Court of Appeals. That Court denied Petitioner's Motion on July 17,1975(by letter, a copy of which is also attached) which raised, being the first opportunity presented, the substantial federal

questions now before this Court. Petitioner now seeks review in this Court within the 90 day time limit for filing the written petition.

Substantial Federal Questions Raised

Petitioner raised the substantial federal questions posed herein for the first time at trial, in the form of the Jordon opinion, 258 Md. 490; 265 A.2d 892, presented to the trial Court by Petitioner's Memorandum dated November 20, 1973. Because of the irregular and anomalous manner in which this matter has been handled, however, most of the denials of federal rights complained of hereinbelow did not occur until the Court of Appeals opinion dated June 3, 1975, and, therefore, some of the

Constitutional questions submitted herein were raised for the first time in Petitioner's Motion for a Reargument dated June 27, 1975. Accordingly, since Petitioner prevailed on the merits at trial, and assumed the passive role as appellee below, therefore Petitioner had no reason to raise the federal questions presented, with the exception noted herein, until such time as the Court of Appeals first took the illegal and improper action announced in its decision dated June 3, 1975, after which date Petitioner raised said federal questions in its Motion for a Reargument, all as aforesaid.

Reasons for Granting the Writ

1. The decision below fails to give effect to the scope and spirit of the Due Process Clause of the 14th Amendment to the Constitution of the United States of America, as interpreted by this Court, and by the conflicting authorities among the highest State Courts and the federal circuits. This Court should undertake to resolve these conflicting precedents at this time, for which the instant case at bar is a suitable and appropriate vehicle.

The 14th Amendment to the Constitution of the United States is clear in its commands that, "No State shall... deprive any person (defined to include a business corporation by this Court as early as the Slaughterhouse cases at 16 Wall. 36,21 L.Ed. 394 ,(1873)) of

life, liberty, or property without due process of law...". The overturning of Petitioner's jury award in the Court of Appeals by reason of limitations, denies Petitioner due process of law, guaranteed against unreasonable State action by the text of the 14th Amendment quoted above. Further, there is no rational basis nor compelling governmental interest underlying or justifying this denial of due process. It is axiomatic that the Due Process Clause essentially guarantees that fundamental personal rights will not be infringed by State action. The State action, necessary to find a violation of due process, is clearly present in the case at bar, consisting of the formal operation of the local government of the Town of Federalsburg under both a State

corporate charter, and under municipal ordinances, regulations, and by Town officials acting under "color of law." Ex Parte Virginia, 100 U.S. 339. Also included in this area is the judicial enforcement of public agreements, on the theory that the actions herein by the Court of Appeals constitutes State involvement. Shelley v. Kraemer, 334 U.S. 1; Kerr v. Enoch Pratt Free Library, 149 F. 2d 212. This Court does not have to "sift facts and weigh circumstances" in an effort to find State action in this case. Burton v. Wilmington Parking Authority, 365 U.S. 715; Evans v. Newton, 382 U.S. 296 since the requisite State action is patent.

Initially, it should be noted that the Respondent began its unreasonable governmental misconduct toward Petitioner

in that from the very inception of the instant Contract of August 6, 1967, Respondent was unilaterally dictating terms and conditions to the Petitioner in its one-sided contract of adhesion. This Contract on its face denies Petitioner procedural Due Process, since Petitioner was not provided with fair notice and an opportunity for a hearing conducted by an independent and unbiased arbiter before adverse action could be taken against Petitioner. Specifically, Respondent required Petitioner to acquiesce in and sign the Contract Documents which provided for the appointment of one of Respondents own incumbent political leaders and employees as the so-called arbiter and referee under the compulsory arbitration of grievances clause in the

Contract. Since this Contract was not a bargained-for arm's length open market transaction, but was rather a deal made between a private Contractor and the huge monopoly of government, which dictated, ipse dicta, all the requirements and clauses of said Contract, therefore, as a consequence, Petitioner cannot be said to have exercised free choice to elect to waive, voluntarily and knowingly, its Constitutional rights. Because litigants are entitled to a fair hearing, with the right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful influences, therefore, as a result, common justice to a litigant requires that the Courts invalidate and ignore the cunning scheme of a quasi-

judicial tribunal, such as the so-called arbiter in this case, who was importuned by his employer, the Respondent, to arrive at the result which was ultimately reached-to not even consider Petitioner's claim on its merits. Pillsbury Co. v. FTC., 354 F.2d 952 (1966). Accordingly, Petitioner submits that Mr. Hargreaves, the Town's "Contracting Officer," named as arbiter, under the Contract, was illegally biased by prejudging this matter, and refusing to entertain the novel legal theory upon which Petitioner's $57,516.46 claim was based, all as set forth hereinbelow. Texaco, Inc. v. F.T.C., 336 F.2d 754; American Cyanamid Co. v. F.T.C., 363 F.2d 757; Tumey v. Ohio, 273 U.S. 510.

It is most important to consider

the position of the Petitioner that the Contracting Officer acted arbitrarily, capriciously, and unreasonably when he declined to exercise subject matter jurisdiction over the 1968 delay claim in the amount of $57,516.42. Since his refusal to consider the merits of this claim was arbitrary, unreasonable, capricious, and therefore improper and illegal, it would then appear to follow that the Contracting Officer and the Court of Appeals, who upheld him, could not in any way prejudice or annul, cancel, or terminate the contractually created right of a full and impartial review upon the merits of this 1968 claim by the foreclosure of the contractual and Constitutional right to his review under Clauses 3 and 6 of the Contract and the 14th Amend. to the United States Constitution.

The prior law in force at the time of the Contracting Officer's letter of October 21, 1968, in which he refused to decide the 1968 delay claim, was encapsulated in the landmark case relating to construction contracts known as United States v. Rice, 317 U.S. 61 (1942). Rice held that delay claims incident to changes in plans and specifications were never contemplated beyond the damage involved in the changes themselves, citing Moran Bros. Co. v. U.S., 61 Ct. Cls. 73; McCord v. U.S., 9 Ct. Cls. 155; Swift v. U.S., 14 Ct. Cls. 208; Griffiths v. U.S., 74 Ct. Cls. 245; 35 Geo. Wash. L. Rev. 908 (1967). The thrust of all these prior cases is this: When the Contracting Officer refused to consider Petitioner's 1968 delay claim, he did so against the

background of doctrine which held that it was not a breach of contract for the government to delay the Contractor's performance for a reasonable time while ordering changes in the plans, drawings, and specifications.

According to Shedd's restatement of this prior doctrine at 32 Geo. Wash. L. Rev. 65 (1963), "The contractor cannot recover damages for breach of contract for the delay expense resulting from the reasonable time taken by the government to make the change, and the expense of such reasonable delay is not a cost which can be allowed in computing the equitable adjustment in price for the change; hence, it is an expense which must be absorbed by the contractor out of the original contract price." The instant

case is distinguishable from the Rice case in that the delays on the Federalsburg job were the result of defective plans and faulty specifications prepared by the contracting authority without any default or contribution by Petitioner. Elaborate proposals were designed and engineered, which were incorporated in the invitation to bid and the subsequent specifications admitted into evidence below. Events have proven that mistakes in design were made.

There is a split of authority with respect to the Rice doctrine, and Maryland changed the prior law set forth in Rice in the case of Dewey Jordan v. Md. National Capital Park & Planning Commission, 258 Md. 490, 265 A.2d 892 (1970); in which the Court of Appeals followed

the line of cases including U.S. v. Spearin, 248 U.S. 132; and followed the better view among the conflicting federal Appellate Circuit Courts of Loburnum Construction Corp. v. U.S., 325 F.2d 451; and J. D. Hedin Construction Co. v. U.S., 347 F.2d 235; when it held that the contracting authority impliedly warrants that the plans and specifications are adequate and sufficient for the purpose intended, and that the contractor is entitled to be compensated for delays in work occasioned by faulty plans and specifications. Thus, any government-caused delay became actionable as a breach of contract, in contrast to the former law. Judge Turner, the Trial Judge, decided upon legally sufficient evidence that the Contracting Officer refused to consider

the 1968 delay claim because the law at that time interpreted the Changes Clause in this contract to permit the delay of the contractor while changes in the specifications were being consumated, and as a result the Contracting Officer only awarded an extension of time to Allied consisting of the twenty-one days referred to in both his letters of October 21, 1968, and February 25, 1969, along with an equitable adjustment of the contract price to cover the increase in time and costs plus a reasonable profit incident to the making of the changes in the piers' reconstruction. Jordon established that the government implicity warrants that the contractor, if he complies with the specifications, will be able to complete the project with-

in the comtemplated period of time.

It is this change in the law which this Court should now recognize as applicable to this case. Up until the time suit was filed on March 2 , 1972, Allied was continually prevailing upon the Contracting Officer to reconsider his refusal of jurisdiction for an equitable adjustment under Clauses 3 and 6 for the 1968 delay claim in the light of Dillon Properties and Jordan, and the correspondence (Allied's letter to Respondent's Mr. Hargreaves dated February 1, 1971) reflects reliance upon these legal developments, which entitled Petitioner to a full and fair hearing on the merits. For its part, the Respondent continued to entertain these overtures and even requested a release from these pending

claims in return for final payment,despite errors in the design of this project,which caused delay in Allied s completion of the work, for which compensation was offered, only by extending its performance time and by payment of any added direct cost occasioned by these changes and mistakes. In short, the Petitioner was led to believe that its damages were defined by the Jordan rule to extend to the costs incurred by reason of the idleness resulting from the Respondent's mistakes. Consequently,Petitioner was forced to resort to the Courts to achieve a hearing on the merits of its 1968 delay claim under the auspices of these recent cases. To allow the Contracting Officer's indecision to stand as a bar to recovery now would impair the obligations of contract

and deny Petitioner substantive and procedural due process of law, as guaranteed by the U.S. Constitution and Amendment XIV against state action denying due process of law.

The effect of the Opinion of June 3, 1975 by the Court of Appeals is to approve and condone the grossly biased Contracting Officer's refusal to afford Petitioner's notice and a hearing as required by procedural due process of law. Further, the Court of Appeals opinion is so arbitrary and unreasonable that it also denies Petitioner substantive due process of law. For instance, the Court of Appeals states that the Contracting Officer's letter dated October 21, 1968 constitutes his final decision on the instant claim when, in fact, not only do

his later letters and actions acknowledge that this claim is still open, but in addition his later letters continue the process of negotiation to the point where it is clear that his mental decisional processes were frozen into the pre-Jordan, traditional Rice point of view. This Court should once and for all overrule Rice, resolve the conflict among the federal circuits and the State s' highest Courts, by at the same time allowing Petitioner's first chance for a full and impartial hearing of any kind on the instant claim of $57,516.42, which occurred only at the trial level, to stand undisturbed.

2. The State of Maryland and its chartered Town of Federalsburg, both through the Contracting Officer,

Mr. Hargreaves, and through the deus ex machina of the Court of Appeals, were intimately involved as the perpetrators of invidious discriminations against Petitioner. Specifically, Petitioner has been tacitly classified as a politically disfavored creditor of state government, and as a result is being treated differently than other persons in the state with respect to the administration of the laws of Maryland. The equal protection clause of the 14th Amendment provides that no state shall, "deny to any person within its jurisdiction equal protection of the laws," and as in the case at bar, some state involvement must be found to bring a case of discrimination under this clause, since purely private discrimination is not always constitutionally

prohibited. Not only is no valid purpose present in singling Petitioner out for special mis-treatment, but, in addition, the tacit classification of Petitioner as a political undesirable is suspect on its face, and must be closely scrutinized. More than a mere rational connection with a legitimate public purpose, such as saving the Town of Federalsburg and its funding-source, the Soil Conservation Service, their public funds, must be found. Here, a discriminatory purpose is present exclusively, and thus the opinion of the Court of Appeals must be struck down. While this Court will not generally examine the motives of State Appellate Court Judges in rendering a legal opinion (as distinguished from the intent of the Court), this Court has, and should exam-

ine, the motive behind unequal governmental action, and if the action is deemed intentionally discriminatory, it will be struck down. If it is merely randomly discriminatory, there may be no violation of equal protection. Yick Wo v. Hopkins, 118 U.S. 356. This Court must employ a balancing test in this area of such fundamental interests as the continued viability of Petitioner's trade and business despite the recent set-back by the Court of Appeals. By applying the same close scrutiny, strict review balancing test employed in the area of fundamental interests such as the right to work, the Respondent must be able to show not only that its objective could not be attained by a measure which did not discriminate, but also that the public in-

terest involved in trimming Petitioner's jury award is out-weighed by the detriments that Petitioner will incur thereby.

Particular instances of invidious discriminations against Petitioner by Respondent and its hired agents are not easy to ignore.

First, considering the previous finding by Judge Turner that this contract was under seal within the ambit of Md. Code § 5-102(a)(5) of the Courts and Judicial Proceedings Article, it is a denial of equal protection of the law on appeal to decline to follow and affirm his opinion dated July 12, 1973, unless the Trial Judge was clearly in error when he determined by a preponderance of the evidence that this contract was under seal. Maryland Rule 886. If there is substan-

tial evidence to support the Trial Court's factual conclusion, that finding must be reviewed in the light most favorable to the prevailing party below, and the Appellate Court should accept that conclusion. Frisoen v. Tropp, 258 Md. 629, 267 A.2d 143 (1970); Liller v. Logsdon, 261 Md. 367, 275 A.2d 469 (1971). To reiterate, the Trial Court, who saw and heard the witnesses, and who had an opportunity to weigh and evaluate their testimony, found this contract to be a specialty. Under Rule 887, to review this interlocutory order, the Trial Judge's ruling that legally sufficient evidence exists must not be set aside unless it was a palpable abuse of his discretion and patently mistaken. It is uncontroverted that the signature page of

the contract document bears Allied Contractors, Inc. corporate seal. Petitioner subscribes to and adopts Judge Diggs' learned exegesis of the law with respect to specialties in Maryland, particularly his ellucidation of the dicta in General Petroleum Corp. v. Seaboard Terminals Corp., 23 F. Supp. 137 (1938), that a modicum of sufficient extrinsic evidence in the nature of "how and when and under what circumstances the corporate seal was affixed", will transform a corporate seal into a legal specialty. Levin v. Friedman, 271 Md. 438, 317 A.2d 831 (1974); Gildenhorn v. Columbia R.E. Title, 271 Md. 387, 317 A.2d 836 (1974). In this case the record plainly reflects that the Court was able to consider all the contract papers as part of the same unitary, continuous, and inte-

grated contract document. In order to interpret this multi-faceted instrument, each portion of it was considered together with all other portions to obtain one coherent and internally consistent whole. Therefore, the Court of Appeals denied Petitioner equal protection at Page 6 of the opinion of June 3, 1975, where it is stated that "no reference to a seal is made in the body of the instrument." Quite the contrary, the testimony was that:"Q. Is this the contract that was submitted by the Mayor and Council of Federalsburg for the work you just described? A. Yes, with this comes the payment and performance bonds and the specifications, and they're all part of the contractual document." It should be noted that the aforesaid payment and performance bonds and the power of attorney attached thereto are all under

seal, the parties "having affixed their seals on the date set forth above." Although these particular parts of the contract were not introduced into evidence, reference was made to them before the Court. A specimen copy of the Bid Bond Form, which is also under seal is in evidence, however, inasmuch as this document also forms a part of the ultimate understanding of the parties andreflects their mutual intentions that this contract be sealed. The Court further could have taken judicial notice of the fact that this type of public works construction contract is most often under seal according to the customs, usage, and course of performance in that industry, due to the long duration of such work and the protracted processing of final payment for all claimed items.

Although Petitioner did concede as indicated on page 4 of the Court of Appeals opinion dated June 3, 1975 that the only evidence, "to support its assertion that the contract in this case is a specialty is that when the document was signed on behalf of Allied by the Vice President, he also impressed the corporate seal on the instrument," Petitioner has never conceded that the two pages of the signature sheet formed the entire contract, and Petitioner's President, Mr. Pecora, clearly stated otherwise at the trial. Thus, a logical construction and internal reconciliation of all parts of this instrument reveals that all but one signature is sealed, and of all the sealed signatures, only one is not clearly designated by language in the instrument as operating to transform

this instrument into a specialty. As stated above, at this point in these proceedings, all findings below must be reviewed in the light most favorable to the Petitioner, in that the entire contract document was intended to be under seal, except, of course, that now Petitioner is being denied equal treatment in contrast to other persons under the laws of Maryland.

With respect to the Respondent's signatory, it is stated at the top of page 6 of the opinion of June 3, 1975 that, "no extrinsic evidence was presented to prove that the town, through adoption of the other party's seal or otherwise, intended the contract, at least as to itself, to operate as a specialty." Unfortunately, the Court of Appeals did not afford the Petitioner the benefit of the Maryland and

majority rule so ably researched by the Court, which states that a rebuttable presumption of a party's adoption as his own of another party's seal can be established (e.g., such as when the instrument purports on its face to be sealed by all the parties signing it). Stroller v Cowan, 7G. & J. 284 (1835); Rockwell v. Capital Traction Co., 25 U.S. Appl 98 (D.C. Cir. 1905); McNulty v. Medical Service of D.C., Inc., 176 A. 2 d 783 (Mun. Ct. D.C., 1962). Applying this presumption in favor of Allied, along with the cardinal rule of public contract law that a unilaterally prepared contract of adhesion should be construed strictly against the party who wrote it, it would appear to follow that what the Court should have stressed is that the Respondent failed to put on any evidence

to rebut this presumption of their adoption of the specialty. Although on the one hand, the doctrine of Pearl Homing Company v. Linthicum, 112 Md. 27, 75 A. 737 (1910), and State, Use of Gilkeson v. Humbird, 54 Md. 327 (1880), is no doubt on point, nonetheless on the other hand, inasmuch as the Resp ondent has accepted the benefit of Allied's seal, it should also accept the burden of the snare it has created for its own convenience and protection. Otherwise, a grave injustice would inadvertently result, whereby the Petitioner is denied the benefit of legal doctrines which the courts afford to more politically favored litigants who have not dared to capture the coffers of an entire town by legal prowess in the trial court.

As another instance of the denial of

equal protection(although Petitioner approves and accepts the Court's reasoning with respect to the tolling of limitations both as to the claim for extras and the 1967 delay claim) Petitioner respectfully represents that Judge Turner's ruling in his opinion of July 12, 1973 was not clearly in error because a preponderance of the evidence revealed a continued pattern of negotiation between the Petitioner and the Respondent, particularly if the record is interpreted in the manner most favorable to the Petitioner as the law requires, were it not being misapplied discrimatorily. Rule 886. Since there is substantial evidence to support the Trial Judge's factual conclusion below, the Court of Appeals should have accepted that conclusion and not disregarded it as arbitrary or unreasonable.

Burroughs Int'l. Co. v. Datronics Eng's., Inc., 254 Md. 327, 255 A.2d 341 (1969). Judge Turner, the Trial Judge, believed the Petitioner's only witness, Mr. Pecora, who testified at the pre-trial hearing on the issue of limitations to the effect that on-going bilateral negotiation on the 1968 delay claim continued up until the time of the filing of this lawsuit. The question of credibility of witnesses is primarily for the trier of facts, and the Court of Appeals only changes the findings of fact of a trial judge when they are clearly erroneous, unless of course, the application of the law is less than uniform, Weaver v. State, 226 Md. 431, 174 A.2d 76 (1961); Johnson v. State, 238 Md. 643, 210 A2d 399 (1965). The trial judge considered Mr. Pecora's testimony to the effect that

there was a meeting with the Contracting Officer, Mr. John Hargreaves on February 19, 1969, which continued negotiations on the 1968 delay claim, as follows:

"Thirdly, on our other large claim of the delay in the redesign of pier two and three, we had talked to him and explained that we had never really had a full meeting on that, that we did have one meeting one time in which the Soil Conservation people said that we (were) outside their scope."

The trial judge also had before him Allied's reply to the Respondent's February 26, 1969, letter, plaintiff's Exhibit No. 15, which Allied dated April 10, 1969, in which the vitality of the discussion of February 19, 1969 on the 1968 delay claim is demonstrated amply. Petitioner

contends, however, that the Court of Appeals misunderstood the tenor of the Respondent's letter, dated October 21, 1968, when at page 10 of the opinion it is stated that "there is no dispute that the rejection Communique was sent on 21 October, 1968, following the required grace period; and was received in due course shortly thereafter.". Rather the Petitioner subscribes to Judge Turner's opinion at page 5 where he states, "Even defendant's own witness, Mr. Ifft, testified that negotiations were conducted after this date on bills and claims pertaining to the contract, which contract defendant now contends had then been completed . It is to be noted that on October 27, 1969, the Contracting Officer, Mr. Hargreaves, wrote the plaintiff and agreed to further discussion of the

claim. The Court agrees that it is doubtful, in this case, from the evidence before it, if limitations has yet begun to run, since there has yet to be a refusal by the Defendant to pay all of the claims of the Plaintiff. It thus appears from the evidence that the Defendant was continuing to communicate with Plaintiff in such a way as to indicate an intention to pay the claim, the big question being when and which agency would ultimately be responsible for the cost of the work done."

A scrutiny of the Exhibits reveals legally substantial evidence to support this conclusion as a matter of law. Why would the Respondent have participated in the continuous meetings, correspondence, and discussions, which are uncontradicted by all the testimony, as late as 1971 if

the 1968 claim had been finally rejected? The evidence of Respondent's mere failure to pay, or its bad faith in not considering a claim on a legal theory not overruled, was not evidence that payment would not be forthcoming later. Consequently, the Petitioner now finds itself in the posture of being penalized for relying on the representations and assumed good faith of the Respondent's agents, in an effort to settle these disputes short of litigation.

Several points remain to be considered. As mentioned in the foregoing, Respondent's letter dated October 21, 1968 was not a final rejection of the 1968 delay claim as interpreted by the Court. All that letter, at page 4, said in this regard is:

> "Also take notice that your reference to added cost of $57,516.42

> reflecting a claim for delay was thoroughly discussed in light of the General Provisions of the Contract at our October 7, 1968 meeting; and it was agreed that, under the terms of this contract, the contracting officer could not consider such a claim."

Thus, the merits of this claim were never considered as required by Clause 6 with reference to its two prerequisites:

(1) The Respondent never granted the Petitioner at least thirty days in order to further support its claim, inasmuch as the Respondent's agents declined to assume jurisdiction over the subject matter for reasons more fully developed hereinabove, primarily relating to recent changes in Maryland Case law.

(2) The Respondent never furnished the Petitioner with a signed copy of the Contracting Officer's decision simply because no decision on the merits of this claim was ever reached. Inasmuch as it is conceded in the opinion that the performance by the town of these two prerequisites was a condition precedent to the running of limitations, at page 8 where it is stated:

> "it is upon actual compliance with the Appellant's contractual right of review that Allied's cause of action for these claims becomes both vested and enforceable,"

therefore, Petitioner would submit that the noncompliance with the procedure in Clause 6 has arrested and suspended the statue of limitations. Thus, just as the

Court of Appeals has ruled with respect to the 1967 delay claim, so also with the 1968 delay claim the town failed to comply with the condition precedent provisions contained in Clause 6 requiring the thirty day grace period to be given Petitioner to further substantiate its pending claim before the town makes a final acceptance or rejection decision as aforesaid. There is no evidence of the consideration of the merits of this claim at any place in the entire record, and Petitioner was led to believe that the 1968 delay claim was also in the hopper, because the Contracting Officer was palpably definite when he wanted to reject other charges, yet he never could respond with that same level of definiteness and clarity with respect to the 1968 delay claim, because he had never even heard the matter upon the evidence in the first instance.

It is rather conclusively established by at least two later letters in the Record that the letter of October 21, 1968 was not intended to be a final determination in regard to the 1968 delay claim for $57,516.42, item X-6. Petitioner's Exhibit No. 3, which is in the Record , is a letter dated September 19, 1969 from John R. Hargreaves, Contracting Officer of the Respondent Town (and note, also wrote the letter of October 21, 1968) to Allied indicating that Mr. Hargreaves considered this claim still open and Plaintiff's Exhibit No. 37, also in the record, a letter dated September 26, 1969 from Allied to Mr. Hargreaves shows that the 1968 delay claim x-6, was still open. See particularly item 3 in the letter of September 26, 1969 and the second paragraph of the "Hargreaves"

letter of September 19, 1969. For the convenience of the Court, the letter of September 19, 1969 is attached as "Petitioner's Exhibit 1" and the letter of September 26, 1969 as "Petitioner's Exhibit 2".

Judge Turner was not clearly in error when, with Respondent's letter of February 25, 1969 before him, he found that "clear, distinct, and unqualified admission" which constitutes the requisite acknowledgement of a claim required by Maryland law. Doughty v. Bayne, 222 Md. 361, 160 A.2d 604 (1960); Hall v. Barlow, 260 Md. 327, 272 A2d 386 (1971); Mettee v. Boone, 251 Md. 332, 247 A.2d 390 (1968); Brosius v. City of Hagerstown, 237 Md. 374, 206 A.2d 571 (1965). Specifically, that letter reveals on page 2 that not only was an additional twenty-one days time extension

granted, in part due to the 1968 delay claim, but in addition the closing paragraph requests "complet(ion) (of) the release of claims statement in the lower right-hand corner of this (final payment) estimate and return (of) the completed copy to me so that this estimate can be processed for payment." Thus, not only had the Respondent acknowledged the existence of the unresolved and unconcluded claims, but the Respondent had even gone so far as to indirectly attempt to use the threat of withholding final payment as a Sword of Damacles to coerce Allied into waiving these claims. (See Respondent's letters of September 19, 1969 and February 25, 1969).

Finally, in the foregoing vein, an examination of Respondent's letter dated February 6, 1969 which was introduced into

evidence, supports Allied's contention that the outstanding claim of $57,516.42 had not been fully resolved and that any pending matters were to be discussed at the meeting set up for February 19, 1969, particularly in the first sentence: "Arrangements have been made with all concerned parties to meet at John Hargreaves' office in Annapolis, Maryland, to discuss the remaining outstanding claims on our above mentioned contract". At a minimum the words, "outstanding claims", are ambiguous and confusing with respect to the inclusion therein of any and all claims concerning the 1968 delay claim. Therefore, the finding of the trial judge, in favor of the Petitioner cannot and must not now be set aside; but, instead must be resolved in favor of the Petitioner in accordance

with the clear mandate of the authorities and the reasoning set forth above, if Petitioner is to be afforded the equal protection of the law.

In conclusion, it should be evident that the Court of Appeals judgment of June 3, 1975 is not based upon any ground which is entirely independent from the federal issues hereinabove discussed. Furthermore, no legitimate and substantial state interest exists as an adequate and independent state ground of decision. Henry v. Mississippi, 379 U.S. 443. Thus, the Court of Appeals judgment will not stand if the federal rights of the Petitioner are vindicated. Herb v. Piticairn, 324 U.S. 117. It is submitted that if the Petitioner's opportunity to raise these federal questions in the state proceedings

was denied him at both the administrative and appellate levels, then Petitioner is not precluded by overly technical or novel procedural requirements from vindicating its rights now. Staub v. City of Baxley, 355 U.S. 313; N.A.A.C.P. v. Alabama, 357 U.S. 449. Here, the Court of Appeals decision turned on the denial of equal protection and due process of law to the Petitioner, and therefore this Writ should issue. New Orleans Waterworks v. Louisianna Sugar Refinery Company, 125 U.S. 18.

By way of illustration, had Petitioner's initial due process hearing at the trial court on the award of damages authorized by the Jordan case been sustained below, or in the alternative, had the Petitioner been afforded equal protection

of the presumption in Maryland, that the Respondent had adopted Petitioner's seal, or that the course of dealing between the parties had tolled the statute of limitations in the manner defined by the case law, then, and in that event, Petitioner would have won this case in the Court of Appeals because the federal rights aforesaid would have been vindicated, thereby affording Petitioner a full hearing on the 1968 delay claim for $57,516. 42, as well as the benefit of all of the Maryland doctrines by which the jury's award is legally justified.

Conclusion

For the reasons given hereinabove, Petitioner respectfully asks that its Petition for a Writ of Certiorari be granted, in order to review the judgement of the Court of Appeals of the State of Maryland.

Respectfully submitted,

David Aaronson
American University Law School
Washington, D. C.

(202) 656-5566

Counsel for Petitioner

Certificate of Service

I hereby certify that on this_____ day of October, 1975, three copies of the Petition for a Writ of Certiorari were mailed by United States mail, Certified, Return Receipt Requested, to:

Starke M. Evans
Attorney at Law
14 Morris Avenue
Federalsburg, Maryland 21632,

Counsel for the Respondent. I further certify that all parties required to be served have been served.

_____

Counsel for Petitioner

ALLIED CONTRACTORS, INC.

v.

TOWN OF FEDERALSBURG, MARYLAND

No._____

APPENDIX

Oct. Term, 1975.

PETITION FOR A WRIT OF CERTIORARI

MAYOR AND COUNCIL OF FEDERALSBURG, MARYLAND *v.* ALLIED CONTRACTORS, INC.

[No. 156, September Term, 1974.]

Decided June 3, 1975.

CORPORATIONS—*Contracts Under Seal — Affixing Corporate Seal Does Not Make Instrument A Specialty — Contract Itself Or Extrinsic Evidence Also Must Show Parties Intended To Create A Specialty.* pp. 155-156

CONTRACTS — *Seals—Where Seal Attached To Signature Of One Party, But Not To Signature Of Other Party, Contract As To Latter Is Simple Contract While As To Former It Is Contract Under Seal — But One Party May Be Deemed To Have Adopted Other Party's Seal In Certain Cases.* pp. 156-157

CONTRACTS — *Seals — Simple Contract In Instant Case.* Where construction contract between town and corporate builder was sealed only by builder, where no reference to a seal was made in the body of the contract, and where no extrinsic evidence was presented to prove that the town, through the adoption of the other party's seal or otherwise, intended the contract, as to itself, to operate as a specialty, the Court *held* the contract was a simple one, requiring suit to be filed within three-year statute of limitations. p. 157

CONTRACTS — *Statute Of Limitations — Begins To Run From Date Of Breach, i.e., When Cause Of Action Accrues.* Where contract provided that any claim of contractor had to be submitted to contracting officer for decision, and that contracting officer had to grant contractor at least thirty days to further support its claim, and after expiration of this period contracting officer was required to "furnish" to contractor a signed copy of the contracting officer's decision, the Court *held* that contractor's cause of action for breach of contract did not accrue until contracting officer either furnished decision, in accordance with terms of contract, or by inaction or quiescence waived its right to furnish a decision. pp. 157-159, 161-162

STATUTES OF LIMITATIONS—*Contract—Accrual Of Cause Of Action.* Where contract required town's contracting officer "to mail or otherwise furnish a signed copy" of his decision regarding claim for extra work to contractor, the Court *held* that this language accorded the contractor the right to *receive* the decision; and that three-year statute of limitations did not begin to run until contractor received the decision denying its claim. pp. 159-160

STATUTES OF LIMITATIONS—*Contract—Statute May Be Tolled By Actions Of Defendant — Unqualified Admission Or Acknowledgment Of Debt Tolls Statute Of Limitations.* Where there was no evidence that defendant had ever acknowledged a debt alleged to be due plaintiff, the Court *held* that trial court erred in not holding plaintiff's contract claim, brought more than three years after cause of action accrued, to be barred by the statute of limitations. Courts Article § 5-101. pp. 160-161

TRIALS — *Comment By Trial Judge In Presence Of Jury — Trial Judge Should Not Indicate He Believes Particular Witness — Any Prejudice Resulting From Such Comment Usually Can Be Cured By Instruction To Jury — No Prejudice In Instant Case.* pp. 162-163

TRIALS — *Instructions To Jury — Objections Must Be Made To Instructions To Preserve Them For Appeal — Maryland Rule 554.* p. 163

APPEAL — *Scope Of Review — Court Will Not Review Issues Not Tried And Decided By Lower Court — Maryland Rule 885.* pp. 163-164

J. A. A.

Appeal from the Circuit Court for Queen Anne's County (TURNER, J.).

Action in the Circuit Court for Caroline County by Allied Contractors, Inc., against Mayor and Council of Federalsburg, Maryland, for moneys alleged due under a construction contract. The case was removed to the Circuit Court for Queen Anne's County where, in a jury trial, Allied was awarded damages of $74,022.66. From a judgment on that verdict, the Mayor and Council appeal.

Judgment of the Circuit Court for Queen Anne's County in the amount of $74,022.66 reduced by $57,516.42 to $16,506.24, and as so reduced, it is affirmed. Costs to be paid one-half by appellant and one-half by appellee.

The cause was argued before MURPHY, C. J., and SINGLEY, DIGGES, LEVINE, ELDRIDGE and O'DONNELL, JJ.

Starke Matthew Evans for appellant.

J. Owen Wise for appellee.

DIGGES, J., delivered the opinion of the Court.

The appellee, Allied Contractors, Inc., initiated this suit in the Circuit Court for Caroline County against the appellant, the Mayor and Council of Federalsburg, Maryland, a municipal corporation, for moneys Allied claims it is owed by the town under a construction contract. The case was removed to the Circuit Court for Queen Anne's County where, in a jury trial, the contractor was awarded damages in the amount of $74,022.66. From the judgment which was entered on that verdict, Federalsburg appeals.

The wellspring of this conflict is the contract which was entered into by Federalsburg and Allied on 28 July 1967. Under this agreement, the appellee was to underpin and otherwise reinforce as well as lengthen the piers of a highway bridge and the nearby railroad trestle, both of which span the Marshyhope Creek within the town limits. In addition, as part of the construction project, this creek, which is frequently referred to as the northwest fork of the Nanticoke River, was to be deepened, its channel widened, and its slopes protected so as to prevent erosion in the vicinity of these two parallel bridges. This undertaking, the initial stage of an extensive flood control program being pursued in cooperation with other governmental agencies,[1] began in September of 1967 and was completed to Federalsburg's satisfaction one year later, on 17 September 1968.

The project contractor in this suit asserts that it is due compensation over and above the base price established in the contract because, while carrying out its obligations to the appellant, Allied provided, at Federalsburg's request, additional labor and services for the town including more guniting (the pneumatic application of mortar) of the highway bridge's first pier than was originally contemplated

1. By virtue of a separate agreement, Federalsburg was to be reimbursed by the Soil Conservation Service, an agency of the United States Department of Agriculture, for most of the expenditures which the town assumed under the contract with Allied; apparently, the Maryland State Highway Administration, under yet another agreement, was to repay Federalsburg for certain highway bridge repairs done by Allied for the town.

by the agreement. Furthermore, Allied seeks to be reimbursed for its costs which it alleges resulted from the unjustifiable issuance of stop work orders by the town's contracting officer. In submitting this latter claim, Allied urges that it is entitled to remuneration for two work stoppages, the first in 1967 and the second in 1968, which were directed by Federalsburg's contracting officer not for Allied's benefit but to accommodate the town. Following receipt by that contracting officer of these additional compensation demands, considerable correspondence and verbal discussions ensued between the contracting parties but, throughout these communications, the appellant constantly denied having a financial obligation for any of them.[2] Eventually, however, when it became painfully obvious to Allied that continued "negotiations" would not bear fruit, the contractor instituted this suit on 2 March 1972.

Federalsburg responded to Allied's amended declaration by filing a special plea of limitations along with its pro forma general denial. After testimony was taken at a pre-trial hearing confined to the limitations issue,[3] Judge Turner ruled that the suit was not barred by the statute of limitations.

On appeal, in seeking a reversal of the judgment, the principal contention of Federalsburg, and the only one which we find to have any substance, is that the trial judge erred when he ruled that each of the unpaid claims for additional compensation was not barred by limitations. In addition, the appellant asserts that the trial judge committed prejudicial error when he: (i) made certain comments concerning the evidence in the presence of the jury; (ii) allowed "the jury to speculate and consider all aspects of plaintiff's [(Allied's)]

2. Likewise, when the State Highway Department and the Soil Conservation Service were consulted as to their responsibility for contribution, each balked at the notion that it should, even partially, compensate Allied.

3. Apparently with agreement of the parties, the questions raised by the limitations plea were submitted, as a pre-trial matter, to Judge Turner for decision. For a discussion of the proper procedure when there is no such agreement and a factual dispute exists see W., B. & A. Elec. R.R. Co. v. Moss, 130 Md. 198, 207, 100 A. 86 (1917).

BEST COPY AVAILABLE

claim under count number one of said declaration after the evidence clearly established the existence of a written contract as alleged by plaintiff in counts two, three, and four" ; and (iii) concluded that there was "sufficient evidence to uphold a finding of a new benefit to the defendant [(Federalsburg)] in the amount of $74,022.66 as required to be found by the trial court's instructions to the jury." We will consider and dispose of each of these arguments seriatim.

Three distinct questions comprise the limitations issue presented by this case. These are: whether the contract was under seal so as to create a specialty and thus make the applicable period of limitations twelve years, under § 5-102 (a) (5) of the Courts and Judicial Proceedings Article of the Maryland Code (1974), rather than the three-year period for simple contracts, under § 5-101 of that Article; on what date did the statutory period, as it pertains to each claimed item of damage, begin to run; and whether, once the period commenced, there were subsequent occurrences which tolled its running?

The only evidence, Allied concedes, to support its assertion that the contract in this case is a specialty is that when the document was signed on behalf of Allied by its vice-president, he also impressed the corporate seal on the instrument. The law in Maryland, as has been recently and fully discussed by this Court in *Levin v. Friedman*, 271 Md. 438, 317 A. 2d 831 (1974) and *Gildenhorn v. Columbia R. E. Title*, 271 Md. 387, 317 A. 2d 836 (1974), requires more than the mere affixing of the corporate seal to transform a would-be simple contract into one under seal. Indeed, as is made clear by those two cases and *General Petroleum Corp. v. Seaboard Terminals Corp.*, 23 F. Supp. 137 (D. Md. 1938), if a corporate seal is impressed on an agreement it will remain a simple contract unless either the body of the contract itself indicates that the parties intended to establish an agreement under seal, or sufficient extrinsic evidence, in the nature of "how and when and under what circumstances the corporate seal was affixed," *General Petroleum Corp. v. Seaboard Terminals Corp.*, *supra* at 139,

establishes that the parties desired to create a specialty. In *Seaboard* Judge Chesnut in discussing the Maryland law applicable to seals stated:

> "If the contract is signed by an *individual* opposite and in obvious relation to a legally sufficient seal, the instrument will be taken as a sealed document, where there is nothing on the face of the paper to indicate the contrary even though there be no reference to the seal in the wording of the paper. 'A recital of the sealing or of the delivery of a written promise is not essential to its validity as a sealed contract.' . . . . 'A promisor who delivers a written promise to which a seal has been previously affixed or impressed with apparent reference to his signature, thereby adopts the seal.' . . .
>
> "But with respect to a contract executed by a *corporation*, the mere presence of its seal on the paper without any other reference therein to the seal, does not *necessarily* make the contract a specialty, because it is possible the corporate seal was impressed merely as prima facie evidence of corporate authority for the execution of the paper; and in that case extrinsic evidence is admissible to show whether the use of the seal was intended to make the paper a specialty or merely as evidence of its authorized execution, or that it was in fact used without authority." (citations omitted). 23 F. Supp. at 140-41.

Moreover, even though a contract need not always have as many separate seals as there are signatories to it, since in some circumstances a rebuttable presumption of a party's adoption as his own of another party's seal can be established (*e.g.*, such as when the instrument purports on its face to be sealed by all the parties signing it), *Stabler v. Cowman*, 7 G. & J. 284 (1835); *Rockwell v. Capital Traction Co.*, 25 U. S. App. 98 (D.C. Cir. 1905); *McNulty v. Medical Service of D.C., Inc.*, 176 A. 2d 783 (Mun.Ct. D.C. 1962),

ordinarily when a seal is attached to the signature of one of the parties but not to that of the other party, the contract as to the latter is a simple contract while as to the former it is a contract under seal. *Pearl Hominy Co. v. Linthicum*, 112 Md. 27, 75 A. 737 (1910); *State, Use of Gilkeson v. Humbird*, 54 Md. 327 (1880). In this case it is undisputed that the only seal attached to this document is Allied's corporate seal; no reference to a seal is made in the body of the instrument; and no extrinsic evidence was presented to prove that the town, through adoption of the other party's seal or otherwise, intended the contract, at least as to itself, to operate as a specialty. Thus, as the contract in this case is a simple one, for this suit to have been timely against the appellant, if not the appellee, it had to have been filed within the three-year period of limitations mandated by § 5-101 of the Courts Article.

Having concluded that three years is the applicable limitations period in this instance, we now must determine when that statutory period commenced to run. In contract cases, the general rule is that the period of limitations begins to run from the date of the breach, for it is then that the cause of action accrues and becomes enforcible. *Cotham and Maldonado v. Board*, 260 Md. 556, 273 A. 2d 115 (1971); *Whitcomb v. Horman*, 244 Md. 431, 224 A. 2d 120 (1966); *Fisher v. Medwedeff*, 184 Md. 167, 40 A. 2d 360 (1944); *Vincent v. Palmer*, 179 Md. 365, 19 A. 2d 183 (1941). Normally, unless the contract provides otherwise, a cause of action for extra labor and services accrues when the work is done or services provided. *Md. Cas. Co. v. West. Constr. Co.*, 139 Md. 171, 114 A. 890 (1921); *Dempsey v. McNabb*, 73 Md. 433, 21 A. 378 (1891). But it is also true that when the contract requires some action, such as an accounting, a billing or a hearing, by one or both of the parties before the obligation for payment fully blossoms, then the performance of that activity is "a condition precedent to recovery of such payments, absent bad faith or collusion." *Laurel Race Course, Inc. v. Regal Constr.*, 274 Md. 142, 333 A. 2d 319, 325 (1975); *Vincent v. Palmer, supra; cf. Henry's Drive-In v. Pappas*, 264 Md. 422, 287 A. 2d 35 (1972).

A close examination of this Federalsburg-Allied contract reveals that it contains a provision, Clause 6, which is analogous to one requiring an accounting before payment becomes due. That provision reads:

> "6. CLAIMS
>
> Any claim by the Contractor arising by virtue of this contract which is not disposed of by agreement shall be submitted in writing, together with any written and oral evidence in support thereof, to the Contracting Officer for decision. Before making a decision the Contracting Officer shall notify the Contractor that any additional written and/or oral evidence in support of the claim may be presented to the Contracting Officer within 30 days from receipt by the Contractor of such notification, or within such further period of time as may be granted by the Contracting Officer. The Contracting Officer shall make his decision in writing and mail or otherwise furnish a signed copy thereof to the Contractor. Pending the decision of the Contracting Officer the Contractor shall proceed diligently with the performance of this contract."

Under this clause of the contract, in order for Federalsburg's denial of a claim to operate as its final decision so as to commence the running of limitations, two prerequisites must be met — the town must grant Allied at least thirty days in order to further support its claim; and after the expiration of this period, it must "furnish" to Allied a signed copy of the contracting officer's decision. Thus, it is upon actual compliance with the appellant's contractual right of review, inaction by Federalsburg resulting from bad faith or fraud, or quiescence for such duration set in such circumstances as to constitute estoppel or waiver, that Allied's cause of action for these claims becomes both vested and enforceable. Since inaction and quiescence are not alleged to be present here we will confine our analysis in this case to an evaluation of the appellant's compliance with Clause 6.

In this regard, Federalsburg asserts that its contracting officer finally rejected each of Allied's claims in compliance with Clause 6 more than three years before Allied's suit, and thus the entire action was barred by limitations.

In considering the appellant's argument, as it pertains to the extras, the town asserts that the procedure it employed in refusing Allied's request for remuneration for the work was to allow Allied at least thirty days to supply supportive information and then to furnish the appellee with a final rejection letter which specifically denoted that the denial constituted "the decision of the Contracting Officer pursuant to Clause 6 of the General Provisions of the contract." Although this letter was dated 25 February 1969, it was determined by Judge Turner that Allied did not receive it until 4 March of that year; this raises the question of whether, under the terms of this contract, the statute commenced to run on the date the contracting officer's decision was sent or on the date it was received — if on the former, filing suit on 2 March 1972 would not be timely; if on the latter, the filing of suit was timely by two days. This quandary is easier asked than answered because of the dearth of authority discussing it. We find no Maryland case on point and, in fact, the only case we were able to uncover is *Campanella & Cardi Constr. Co. v. Commonwealth*, 351 Mass. 184, 217 N.E.2d 925 (1966), in which the Supreme Judicial Court of Massachusetts held, upon facts somewhat the same as those in the instant case (although we cannot say definitely because the provisions of the contract there are not set out in full), that the statute of limitations began to run on the date the contractor is *sent* the "semifinal estimate" rather than when he *receives* it. Assuming that the contract in *Campanella* contained a provision substantially similar to Clause 6 of the Federalsburg-Allied contract, with due respect to the Massachusetts court, we find its reasoning not to be persuasive as it pertains to this case because Clause 6 obligates the contracting officer "to mail or otherwise furnish a signed copy" of his decision to Allied, thus according the appellee the right to *receive* such communication before it becomes effective for purposes of

beginning the running of the three-year time period. Furthermore, a holding that the breach occurred on the date it was sent so as to commence the running of limitations at that point would, in effect, deprive Allied of the full statutory three-year period within which to institute its suit because the contractor would not be aware of the town's final denial of its claim until the letter was received, however long that might be. In the instant case, the difference would be only a matter of days, but if the letter were delayed in transit for a substantial time, an occurrence which is all too frequent nowadays, the time available to bring suit could be much less than the three years established by § 5-101 of the Courts Article. Consequently, Allied's filing of suit for the extras on 2 March 1972 was timely, as the three-year period began to run on the day the rejection was received, 4 March 1969, and recovery for this expense item is not barred by limitations.

As to the 1968 delay claim, the appellant asserts that it fully complied with Clause 6 in much the same way as it did the extras claim — allowing Allied an ample grace period to supply supplementary evidence of the claim; dispatching a final formal rejection letter utilizing the identical language as that used for the extras. There is no dispute that the rejection communique was sent on 21 October 1968, following the required grace period, and was received in due course shortly thereafter; consequently when Allied filed suit for the 1968 delay claim on 2 March 1972, the three-year statute of limitations as to the obligation for this expense had already lapsed, unless a tolling of its running occurred. To determine if a tolling has ever taken place so as to procedurally permit this claim we must ask whether subsequent actions of the appellant, such as an acknowledgment of the debt, would serve to arrest, suspend or begin anew the effect of the statute. This Court encapsulated the law in this area in *Doughty v. Bayne*, 222 Md. 361, 365 160 A. 2d 609 (1960):

> "In determining the effect of these statements we must also be mindful that the acknowledgment

> must be a clear, distinct, and unqualified admission. [(citations omitted)] The evidence of the acknowledgment must also be considered in its entirety, and the creditor cannot accept the admission and reject any qualification that might make the acknowledgment ineffective." See *Hall v. Barlow*, 260 Md. 327, 272 A. 2d 386 (1971); *Mettee v. Boone*, 251 Md. 332, 247 A. 2d 390 (1968); *Brosius v. City of Hagerstown*, 237 Md. 374, 206 A. 2d 571 (1965).

A careful scrutiny of the record here reveals no evidence which could be said to constitute an acknowledgment under this test. In fact what is gleaned from this examination is that the appellant continually denied any obligation for the 1968 delay and in that light the town's participation in discussions about the claim, no matter with what frequency or intensity, does not constitute "a clear, distinct, and unqualified admission" of any debt. Therefore, it was improper for the court to permit the jury to include in its verdict the amount of $57,516.42 for the 1968 delay.

Allied's request for damages caused by the 1967 delay presents a different problem for the town in sustaining its argument that this claim, like the 1968 delay request, is also barred by limitations. A review of the record discloses that not only was no formal rejection of this demand received by Allied from the contracting officer prior to 4 March 1969, but the only communication which even arguably could be construed as constituting a final written decision of rejection under Clause 6, so as to bar this delay claim because of limitations, is a short statement contained in a letter dated 16 January 1968 where the contracting officer advises the appellee that "[n]o costs for delays are being considered . . . ." This letter, however, fails to comply with the condition precedent provision contained in Clause 6, which requires that a thirty-day grace period be given Allied to further substantiate its previously submitted claim, before the town makes a final acceptance or rejection decision. As the 1967 delay period for which payment is

requested ended on 20 December 1967 and the only letter which might be considered a final rejection, prior to the one sent on 25 February 1969, was dated 16 January 1968, then it is evident that as to this claim the appellant failed to allow Allied the thirty-day grace period required by Clause 6. After this 16 January letter, there were no other indications of a final rejection of the 1967 delay claim by the town's contracting officer until the 25 February 1969 letter was received by Allied on 4 March of that year. Indeed, throughout this approximately thirteen-month interim, not only did Federalsburg discuss various costs with Allied, including those for this particular delay, but the town, in effect, led Allied to believe that this claim was still in the hopper in that its contracting officer was palpably definite when he wanted to reject other charges (witness the 1968 delay claim refusal) yet he never responded with that level of definiteness and clarity in respect to the 1967 delay claim. Thus, it was not until the contracting officer's 25 February 1969 letter was received by Allied on 4 March 1969 that the limitations as to the 1967 delay claim began to run. We come to this conclusion because this letter is tantamount to a final rejection under Clause 6 of any obligation for the expense incurred during the 1967 delay by virtue of the fact that it enclosed a final list of only those items Federalsburg was willing to pay, which list did not include any allowance for the 1967 delay claim.[4] And since, as already pointed out, this suit was instituted within three years of the 4 March date, there exists no limitations bar to the 1967 delay claim.

After limitations, the second argument made by the appellant is that the trial judge committed prejudicial error by commenting on a portion of the evidence in such a way as to indicate to the jury that he believed the contractor's witness. In this regard, Federalsburg points to the remark Judge Turner made, in the hearing of the jury, while ruling on an objection raised during the cross-examination of Allied's president. With emphasis on the words the

---

4. The 25 February 1969 letter did not specifically refer to this 1967 delay claim, but even if this letter did not constitute a final denial in this regard, no one here has suggested that suit for the claim is premature.

appellant deems to be prejudicial, we quote in full the judge's statement:

> "I don't think it's important. This is a matter that certainly can be confusing to the Jury. They're going to decide most of the facts in this case. Mr. Pecora [(Allied's president)] is in court asking for those figures, for those three counts that were shown here on the board, and *certainly, it appeared that he didn't make anything, that he lost money.* I don't think that it is proper or necessary at all to go into what he made on this job. He said he didn't make anything, he lost money."

A discussion of what possible effects this statement could have had on the jury would only involve a worthless debate. Suffice it to say, an objective reading of this ruling, without pulling any specific group of words out of context, will leave one with the clear understanding that all the judge really did was to succinctly restate, in an unbiased manner, the testimony of the witness. In any event, the error, if any, was not of such a magnitude as to require the extreme step of nullifying the entire proceeding by declaring a mistrial, as the appellant sought, when something much less severe would have corrected any faulty impression which may have been conveyed to the jury. But no request for such an instruction was made and, therefore, we cannot say that the trial judge abused his discretion when he denied the appellant's motion that a mistrial be ordered. *Cf. DeMay v. Carper*, 247 Md. 535, 233 A. 2d 765 (1967); *Jacobson v. Julian*, 246 Md. 549, 229 A. 2d 108 (1967); *Bailey v. Wray*, 230 Md. 359, 187 A. 2d 101 (1963).

And finally, in regard to points three and four, although not entirely clear, the appellant seems to be taking exception to the trial judge's instructions given to the jury pursuant to Rule 554 a, b and c, but the record discloses that no objections were made by the appellant to that instruction (Rule 554 d) and they, therefore, may not be raised on appeal (Rule 554 e). In any event, the two questions do not "plainly appear by the record to have been tried and decided by the

lower court," and consequently we will not venture to decide or discuss them further. Rule 885.

Judgment of the Circuit Court for Queen Anne's County in the amount of $74,022.66 reduced by $57,516.42 (amount allowed for the 1968 delay) to $16,506.24, and as so reduced it is affirmed.

Costs to be paid one-half by the appellant and one-half by the appellee.

TOWN OF FEDERALSBURG, APPELLANT	*	IN THE COURT OF APPEALS OF MARYLAND
-vs-	*	
ALLIED CONTRACTORS, INC., APPELLEE	*	SEPTEMBER TERM 1974 NO. 156

MOTION FOR A REARGUMENT, OR IN THE ALTERNATIVE EITHER FOR A MODIFICATION OF THE OPINION OF JUNE 3, 1975, OR FOR A STAY OF THE MANDATE AND A REMAND TO THE TRIAL COURT FOR THE TAKING OF ADDITIONAL TESTIMONY.

Allied Contractors, Inc., Appellee, by Owen Wise, its Attorney, moves pursuant to Maryland Rule 850, for a modification of the opinion filed by this Honorable Court and in support thereof respectfully shows:

Introduction

(1) The appeal in this case was argued before this Court on March 4, 1975.

(2) On June 3, 1975 this Court rendered its decision in favor of the Appellant in part and against Appellee in part from a judgement on the jury verdict for the Appellee, reducing the judgement of the Circuit Court for Queen Annes County in the amount of $74,022.66 by $57,516.46 (amount allowed for the 1968 delay) to $16,506.24, and as so reduced, it was affirmed.

(3) Appellee seeks a modification of the opinion of June 3, 1975, such that the Claim for $57,516.46 was not barred by limitations upon the following grounds:

(A) The Court erred in that the Trial Court was not clearly in error when it ruled that there was legally sufficient extrinsic evidence that this contract was under seal.

(B) The Court erred in that the Trial Court was not clearly in error when it ruled that there was legally sufficient evidence of conduct by the parties which tolled the statute of limitations.

(C) The Court erred in that as a matter of recent Maryland case law, the 1968 delay claim was within the jurisdiction of the Contracting Officer for his equitable adjustment and that therefore his refusal to consider this claim as stated in his letter of October 21, 1968 was arbitrary, capricious, illegal, and improper, and as such could hardly have been and should not be assumed to have constituted his final decision in view of the requirement of Clauses 3 and 6 of the contract that a hearing be afforded prior to his final decision.

(D) In light of the foregoing, and new evidence which has been recently discovered, the Court should, in the alternative, remand this case for the taking of additional testimony of the witnesses on these points all as hereinafter set forth.

BEST COPY AVAILABLE

ARGUMENT

(A) THE COURT ERRED IN THAT THE TRIAL COURT WAS NOT CLEARLY IN ERROR WHEN IT RULED THAT THERE WAS LEGALLY SUFFICIENT EXTRINSIC EVIDENCE THAT THIS CONTRACT WAS UNDER SEAL.

Considering the previous finding by Judge Turner that this contract was under seal within the ambit of Section 5-102(a)(3) of the Courts and Judicial Proceedings Article, it would be an error on appeal to decline to follow and affirm his opinion dated July 12, 1973, unless the Trial Judge was clearly in error when he determined by a preponderance of the evidence that this contract was under seal. Maryland Rule 886. If there is substantial evidence to support the Trial Court's factual conclusion, that finding must be reviewed in the light most favorable to the prevailing party below and the Appellate Court should accept that conclusion. Frisoen v. Troop, 258 Md. 629, 267 A.2d 143 (1970); Diller v. Loesdon, 261 Md. 367, 275 A.2d 469 (1971). To reiterate, the Trial Court, who saw and heard the witnesses and who had an opportunity to weigh and evaluate their testimony, found this contract to be a specialty. While the Appellee does not contest the jurisdiction of this Court under Rule 887 to review this interlocutory order, we believe that the Trial Judge's ruling that legally sufficient evidence exists must not be lightly set aside unless it was a palpable abuse of his discretion and patently mistaken. It is uncontroverted that the signature page of the contract document bears Allied Contractors, Inc. corporate seal. (Appelle's apx. page 8).

The Appellee subscribes to and adopts Judge Digges' learned exegesis of the law with respect to specialties in Maryland, particularly his ellucidation of the dicta in General Petroleum Corp. v. Seaboard Terminals Corp., 23 F. Supp. 137 (1938), that a modicum of sufficient extrinsic evidence in the nature of "how and when and under what circumstances the corporate seal was affixed", will transform a corporate seal into a legal specialty. Levin v. Friedman, 271 Md. 438, 317 A.2d 831 (1974); Gildenhorn v. Columbia R.E. Title, 271 Md. 387, 317 A.2d 836 (1974). In this case the record plainly reflects at page 9 of the Appellee's appendix that the Court was able to consider all these papers as part of the same unitary, continuous, and integrated contract document. In order to interpret this multi-faceted instrument, each portion of it must be considered together with all other portions to obtain one coherent and internally consistent whole. Therefore, this Court erred on page 6 of the opinion of June 3, 1975, where it is stated that 'no reference to a seal is made in the body of the instrument." Quite to the contrary, page 9 of Appellee's appendix reveals that the testimony was that: "Q. Is this the contract that was submitted by the Mayor and Council of Federalsburg for the work you just described? A. Yes, with this comes the payment and performance bonds and the specifications, and they're all part of the contractual document." It should be noted that the aforesaid payment and performance bonds and the power of attorney attached thereto are all under seal, the parties "having affixed their seals on the date set forth above." Although these particular parts of the contract

were not introduced into evidence, reference was made to them before the Court. A specimen copy of the Bid Bond Form, which is also under seal is in evidence, however, inasmuch as this document also forms a part of the ultimate understanding of the parties and reflects their mutual intentions that this contract be sealed. The Court further could have taken judicial notice of the fact that this type of public works construction contract is most often under seal according to the customs, usage, and course of performance in that industry, due to the long duration of such work and the protracted processing of final payment for all claimed items. Although Allied did concede as indicated at page 4 of the Court's opinion dated June 3, 1975 that the only evidence, "to support its assertion that the contract in this case is a specialty is that when the document was signed on behalf of Allied by the Vice President, he also impressed the corporate seal on the instrument," Allied has never conceded that the two pages of the signature sheet formed the entire contract and at Appellee's appendix, page 9, Mr. Pecora clearly stated otherwise. Thus, a logical construction and internal reconciliation of all parts of this instrument reveals that all but one signature is sealed, and of all the sealed signatures, only one is not clearly designated by language in the instrument as operating to transform this instrument into a specialty. As stated above, at this point in these proceedings, all findings below must be reviewed in the light most favorable to the Appellee, e.g., in that the entire contract document was intended to be under seal.

With respect to the Appellant's signatory, it is stated at the top of page 6 of the opinion of June 3, 1975 that, "no extensive evidence was presented to prove that the town, through adoption of the other party's seal or otherwise, intended the contract, at least as to itself, to operate as a specialty." Unfortunately, the Court does not afford the Appellee the benefit of the Maryland and majority rule so ably researched by the Court, which states that a rebuttable presumption of a party's adoption as his own of another party's seal can be established (e.g., such as when the instrument purports on its face to be sealed by all the parties signing it). Stroller v. Cowan, 7G. & J. 284 (1835); Rockwell v. Capital Traction Co., 25 U.S. App. 98 (D.C. Cir. 1905); McNulty v. Medical Service of D.C., Inc., 176 A. 2(d) 783 (Mun. Ct. D.C., 1962). Applying this presumption in favor of Allied, along with the cardinal rule of public contract law that a unilaterally prepared contract of adhesion should be construed strictly against the party who wrote it, it would appear to follow that what the Court should have stressed is that the Appellant failed to put on any evidence at all to rebut this presumption of their adoption of the specialty. Although on the one hand, the doctrine of Pearl Homing Company v. Linthicum, 112 Md. 27, 75 A. 737 (1910), and State Use of Gilkeson v. Humbird, 54 Md. 327 (1880), is no doubt on point, nonetheless on the other hand, inasmuch as the Appellant has accepted the benefit of Allied's seal, it should also accept the burden of the snare it has created for its own convenience and protection. Otherwise, a grave injustice would inadvertently result, which, were the shoe on the other foot, the Appellant Town would no doubt itself

BEST COPY AVAILABLE

object to now, vis a vis, a hypothetical suit by Federalsburg against Allied next year grounded upon the theory that this contract is really under seal.

Appellee would hope that the Court should not fail to formulate a rational answer the the question," why would the parties insist that the Performance and Payment Bonds as sureties be under seal when the contract for which these Performance and Payment Bonds were the surety, was alleged not to be under seal.

(B) THE COURT ERRED IN THAT THE TRIAL COURT WAS NOT CLEARLY IN ERROR WHEN IT RULED THAT THERE WAS LEGALLY SUFFICIENT EVIDENCE OF CONDUCT BY THE PARTIES WHICH TOLLED THE STATUTE OF LIMITATIONS.

While the Appellee approves and accepts the Court's reasoning with respect to the tolling of limitations, both on the claim for extras and the 1967 delay claim, the Appellee respectfully represents that Judge Turner's ruling in his opinion of July 12, 1973 was not clearly in error because a preponderance of the evidence revealed a continued pattern of negotiation between the plaintiff and the defendant, particularly if the record is interpreted in the manner most favorable to the Appellee. Since there is substantial evidence to support the Trial Judge's factual conclusion below, then this Court should accept that conclusion and not disregard it as arbitrary or unreasonable. Burroughs Int'l. Co. v. Datronics Eng's., Inc., 254 Md. 327, 255 A.2d 341 (1969). Judge Turner, the Trial Judge, believed the Appellee's only witness, Mr. Pecora, who testified at the pre-trial hearing on the issue of limitations to the effect that on-going bilateral negotiation on the 1968 delay claim continued up until the time of the filing of this lawsuit. The question of credibility of witnesses is primarily for the trier of facts, and the Court of Appeals only changes the findings of fact of a trial judge when they are clearly erroneous. Weaver v. State, 226 Md. 431, 174 A.2d 76 (1961); Johnson v. State, 238 Md. 643, 210 A.2d 399 (1965). The transcript reflects at page 17 of the Appellee's appendix that

BEST COPY AVAILABLE

the trial judge considered Mr. Pecora's testimony to the effect that there was a meeting with the Contracting Officer, Mr. John Hargreaves on February 19, 1969, which continued negotiations on the 1968 delay claim, as follows:

> "Thirdly, on our other large claim of the delay in the redesign of pier two and three, we had talked to him and explained that we had never really had a full meeting on that, that we did have one meeting one time in which the Soil Conservation people said that we (were) outside their scope."

The trial judge also had before him Allied's reply to the Appellant's February 25, 1969 letter, plaintiff's Exhibit No. 15, which Allied dated April 10, 1969, in which the vitality of the discussion of February 19, 1969 on the 1968 delay claim are demonstrated amply. The Appellee contends, however, that the Court misunderstood the tenor of the Appellant's letter, dated October 21, 1968, when at page 10 of the opinion it is stated that "there is no dispute that the rejection Communique was sent on 21 October, 1968, following the required grace period; and was received in due course shortly thereafter." Rather, the Appellee subscribes to Judge Turner's opinion at page 5 where he states, "Even defendant's own witness, Mr. Ifft, testified that negotiations were conducted after this date on bills and claims pertaining to the contract, which contract defendant now contends had then been completed. It is to be noted that on October 27, 1969, the Contracting Officer, Mr. Hargreaves, wrote the plaintiff and agreed to further discussion of the claim. The Court agrees

that it is doubtful, in this case, from the evidence before it, if limitations has yet begun to run, since there has yet to be a refusal by the Appellant to pay all the claims of the Appellee. It thus appears from the evidence that the Appellee was continuing to communicate with Appellant in such a way as to indicate an intention to pay the claim, the big question being when and which agency would ultimately be responsible for the cost of the work done."

A scrutiny of the Exhibits reveals legally substantial evidence to support this conclusion. Why would the Appellant have participated in the continuous meetings, correspondence, and discussions, which is uncontradicted by all the testimony, as late as 1971 if the 1968 claim had been finally rejected? The evidence of Appellant's mere failure to pay was not evidence that payment would not be forthcoming later. Consequently, the Appellee now finds itself in the posture of being penalized for relying on the representations and assumed good faith of the Appellant's agents, in an effort to settle these disputes short of litigation.

Several points remain to be reconsidered. As mentioned in the foregoing, the Appellant's letter dated October 21, 1968 was not a final rejection of the 1968 delay claim as interpreted by the Court. All that letter, at page 4, said in this regard is:

> "Also take notice that your reference to added cost of $57,516.42 reflecting a claim for delay was thoroughly discussed in light of the General Provisions

of the contract at our October 7, 1968 meeting; and it was agreed that, under the terms of this contract, the contracting officer could not consider such a claim."

Thus, the merits of this claim were never considered as required by Clause 6 with reference to its two prerequisites:

(1) The Appellant never granted the Appellee at least thirty days in order to further support its claim, inasmuch as the Appellant's agents declined to assume jurisdiction over the subject matter for reasons to be more fully developed in Section C hereinbelow, primarily relating to recent changes in Maryland case law.

(2) The Appellant never furnished the Appellee a signed copy of the Contracting Officer's decision simply because no decision on the merits of this claim was ever reached. Inasmuch as it is conceded in the opinion that the performance by the Appellant town of these two prerequisites was a condition precedent to the running of limitations, at page 8 where it is stated:

> "it is upon actual compliance with the Appellant's contractual right of review that Allied's cause of action for these claims becomes both vested and enforceable,"

therefore, Appellee would submit that the noncompliance with the procedure in Clause 6 has arrested and suspended the statute of limitations. Thus, just as the Court has ruled with respect to the 1967 delay claim, so also with the 1968 delay claim Appellant failed to comply with the condition precedent provisions contained in Clause 6 requiring the thirty day grace period to be given

Appellee to further substantiate its pending claim before the Appellant makes a final acceptance or rejection decision as aforesaid. There is no evidence of the consideration of the merits of this claim at any place in the entire record, and Appellant led Appellee to believe that the 1968 delay claim was also in the hopper, in that the Contracting Officer was palpably definite when he wanted to reject other charges, yet he never could respond with that same level of definiteness and clarity with respect to the 1968 delay claim, because he had never even heard the matter upon the evidence in the first instance.

It is rather conclusively established by at least two later letters in the Record that the letter of October 21, 1968 was not intended to be a final determination in regard to the 1968 delay claim for $57,516.42, item X-6. Plaintiff's Exhibit No. 3, which is in the Record, is a letter dated September 19, 1969 from John R. Hargreaves, Contracting Officer of the Appellant Town (and note, also wrote the letter of October 21, 1968) to Allied indicating that Mr. Hargreaves considered this claim still open and Plaintiff's Exhibit No. 37, also in the record, a letter dated September 26, 1969 from Allied to Mr. Hargreaves shows that the 1968 delay claim, X-6, was still open. See particularly item 3 in the letter of September 26, 1969 and the second paragraph of the "Hargreaves" letter of September 19, 1969. For the convenience of the Court, the letter of September 19, 1969 is attached as "Movant's Exhibit 1" and the letter of September 26, 1969 as "Movant's Exhibit 2."

The second point referred to at the beginning of the preceding paragraph, which must be considered in light of the applicable Maryland law espoused so ably by the Court concerns the letter from the Contracting Officer, dated February 25, 1969. Judge Turner was not clearly in error when, with this letter before him, he found that "clear, distinct, and unqualified admission" which constitutes the requisite acknowledgment of a claim required under Maryland law. Doughty v. Bayne, 222 Md. 361, 160 A.2d 604 (1960); Hall v. Barlow, 260 Md. 327, 272 A.2d 386 (1971); Mettee v. Boone, 251 Md. 332, 247 A.2d 390 (1968); Brosius v. City of Hagerstown, 237 Md. 374, 206 A.2d 571 (1965). Specifically, that letter reveals on page 2 that not only was an additional twenty-one days time extension granted, in part due to the 1968 delay claim, but in addition the closing paragraph requests "complet(ion) (of) the release of claims statement in the lower right-hand corner of this (final payment) estimate and return (of) the completed copy to me so that this estimate can be processed for payment." Thus, not only has the Appellant acknowledged the existence of unresolved and unconcluded claims, but the Appellant has even gone so far as to indirectly attempt to use the threat of withholding final payment as a Sword of Damacles to coerce Allied into waiving these claims. (See Appellant's letters of September 19, 1969 and February 25, 1969).

Finally, in the foregoing vein, an examination of Appellant's letter dated February 6, 1969 which was introduced into evidence, supports Allied's contention that the outstanding claim of $57,516.42 had not been fully resolved and that any

pending matters were to be discussed at the meeting set up for February 19, 1969, particularly in the first sentence. "Arrangements have been made with all concerned parties to meet at John Hargreaves' office in Annapolis, Maryland, to discuss the remaining outstanding claims on our above mentioned contract." At a minimum, the words, "outstanding claims," are ambiguous and confusing with respect to the inclusion therein of any and all claims including the 1968 delay claim. Therefore, the finding of the trial judge, in favor of the Appellee, cannot and must not now be set aside; but, instead must be resolved in favor of the Appellee in accordance with the clear mandate of the authorities and the reasoning above set forth.

(C) THE COURT ERRED IN THAT AS A MATTER OF RECENT MARYLAND CASE LAW, THE 1968 DELAY CLAIM WAS WITHIN THE JURISDICTION OF THE CONTRACTING OFFICER FOR HIS EQUITABLE ADJUSTMENT AND THAT THEREFORE HIS REFUSAL TO CONSIDER THIS CLAIM AS STATED IN HIS LETTER OF OCTOBER 21, 1968 WAS ARBITRARY, CAPRICIOUS, ILLEGAL, AND IMPROPER, AND AS SUCH COULD HARDLY HAVE BEEN AND SHOULD NOT BE ASSUMED TO HAVE CONSTITUTED HIS FINAL DECISION IN VIEW OF THE REQUIREMENT OF CLAUSES 3 AND 6 OF THE CONTRACT THAT A HEARING BE AFFORDED PRIOR TO HIS FINAL DECISION.

It is most important to consider the position of the Appellee that the Contracting Officer acted arbitrarily, capriciously, and unreasonably when he declined to exercise subject matter jurisdiction over the 1968 delay claim in the amount of $57,516.42. Accordingly, his refusal to even consider the merits of this claim was arbitrary, unreasonable, capricious, and therefore improper and illegal. It would then appear to follow that the Contracting Officer could not in any way prejudice or annul, cancel, or terminate the contractually created right of a full and impartial review upon the merits of this 1968 claim by his illegal and improper foreclosure of any right to his review under Clauses 3 and 6.

The prior law in force at the time of the Contracting Officer's letter of October 21, 1968, in which he refused to decide the 1968 delay claim, was encapsulated in the landmark case relating to construction contracts known as United States v. Rice, 317 U.S. 61 (1942). Rice held that delay claims incident to changes in plans and specifications were never contemplated

beyond the damage involved in the changes themselves, citing Moran Bros. Co. v. U.S., 61 Ct. Cls. 73; McCord v. U.S., 9 Ct. Cls. 155; Swift v. U.S., 14 Ct. Cls. 208; Griffiths v. U.S., 74 Ct. Cls. 245; 35 Geo. Wash L. Rev. 908 (1967). The thrust of all these prior cases is this: When the Contracting Officer refused to consider Appellee's 1968 delay claim, he did so against the background of doctrine which held that it was not a breach of contract for the government to delay the contractor's performance for a reasonable time while ordering changes in the plans, drawings, and specifications.

According to Shedd's restatement of this prior doctrine at 32 Geo. Wash. L. Rev. 35 (1963), "The contractor cannot recover damages for breach of contract for the delay expense resulting from the reasonable time taken by the government to make the change, and the expense of such reasonable delay is not a cost which can be allowed in computing the equitable adjustment in price for the change; hence, it is an expense which must be absorbed by the contractor out of the original contract price." The instant case is distinguishable from the Rice case in that the delays on the Federalsburg job were the result of defective plans and faulty specifications prepared by the contracting authority without any default or contribution by Appellee. Elaborate proposals were designed and engineered, which were incorporated in the invitation to bid and the subsequent specifications admitted into evidence below. Events have proven that mistakes in design were made.

This Court changed the prior law set forth above in Dewey Jordan v. Md. National Capital Park & Planning Commission, 258 Md. 490, 265 A.2d 892 (1970); in which the Court followed the line of cases including U.S. v. Spearin, 248 U.S. 132; Loburnum Construction Corp. v. U.S., 325 F.2d. 451; and J. D. Hedin Construction Co. v. U.S., 347 F.2d 235; when it held that the contracting authority impliedly warrants that the plans and specifications are adequate and sufficient for the purpose intended and that the contractor is entitled to be compensated for delays in work occasioned by faulty plans and specifications. It should be noted parenthetically that the Soil Conservation Service was also involved in the Jordan case, using a contract form similar to the one involved in this litigation. Thus, any government-caused delay became actionable as a breach of contract, in contrast to the former law. Judge Turner decided upon legally sufficient evidence that the Contracting Officer refused to consider the 1968 delay claim because the law at that time interpreted the Changes Clause to permit the delay of the contractor while changes in the specifications were being consumated, and as a result the Contracting Officer only awarded an extension of time to Allied consisting of the twenty-one days referred to in both the letters of October 21, 1968, and February 25, 1969, along with an equitable adjustment of the contract price to cover the increase in time and costs plus a reasonable profit incident to the making of the changes in the piers' reconstruction. Jordan established that the government implicity warrants that the contractor, if he complies with the

specifications, will be able to complete the project within the contemplated period of time. This warranty is in addition to the condition implied in every construction contract that one delayed in the execution of a contract as the result of a default by the other contracting party would be entitled to recover the damages thus sustained. Organe, Alexandria and Manassas R. R. Co. v. Placide, 35 Md. 315 (1872); Linz v. Schuck, 106 Md. 220, 67 Atl. 286 (1907); Dillon Properties, Inc. v. Minmar Builders, Inc., 257 Md. 274, 262 A.2d 740 (1970); and the cases cited therein.

It is this change in the law which this Court should now recognize as applicable to this case. Up until the time suit was filed on March 21, 1972, Allied was continually prevailing upon the Contracting Officer to reconsider his refusal of jurisdiction for an equitable adjustment under Clauses 3 and 6 for the 1968 delay claim in the light of Dillon Properties and Jordan, and the correspondence (Allied's letter to Mr. Hargreaves dated February 1, 1971) reflects reliance upon these legal developments. For its part, the Appellant continued to entertain these overtures and even requested a release from these pending claims in return for final payment. See the letter of February 25, 1969, above-mentioned. The Appellant could not, according to the new Maryland doctrine, by its errors in the design of this project, cause delay in Allied's completion of the work and then compensate Allied merely by extending its performance time and by payment of any added direct cost occasioned by these changes and mistakes. In short, the Appellee was led to believe that its damages were defined by the Jordan rule to extend to the costs incurred by

reason of the idleness resulting from the Appellant's mistakes. Consequently, Appellee was forced to resort to the Courts to achieve a hearing on the merits of its 1968 delay claim under the auspices of these recent cases. To allow the Contracting Officer's indecision to stand as a bar to recovery now would impair the obligations of contract and deny the Appellee substantive and procedural due process of law, as guaranteed by the U. S. Constitution and Amendment XIV against state action denying due process of law. The Appellee requests the Court to pass upon these threshold federal questions. Judge Turner, of course, had the benefit of this argument, as hereinabove developed, before him, as witness Plaintiff-Appellee's "Brief and Memorandum of Law," dated Nov. 20, 1970, in the record, which cites Jordan, et al; and therefore, once again, the Trial Court's findings should be allowed to stand unimpaired in accordance with this August Tribunal's established rules of practice.

(D) IN LIGHT OF THE FOREGOING, AND NEW EVIDENCE WHICH HAS BEEN RECENTLY DISCOVERED, THE COURT SHOULD, IN THE ALTERNATIVE, REMAND THIS CASE FOR THE TAKING OF ADDITIONAL TESTIMONY OF THE WITNESSES ON THESE POINTS ALL AS HEREINAFTER SET FORTH.

Rule 871 of the Maryland Rules of Procedure permits a remand "if it shall appear to this court that the substantial merits of a case will not be determined by affirming, reversing, or modifying..., or that the purposes of justice will be advanced by permitting further proceedings in the cause, including the introduction of additional evidence." 22 Md. L.R. 99 (1963). The purpose for so remanding would be to prevent the perpetration of a substantial, albeit inadvertent, injustice upon the Appellee hereunder, by allowing the Trial Court to develop more concrete and accurate factual information on certain specific questions relating to the issue of limitations, in order to remove the uncertainty and speculation from the present posture of this case. The Appellee only requests a limited remand in the alternative, if this Court should not modify its opinion on the basis of the evidence submitted thus far. This Court's absolute right to remand upon a meritorious claim has been established beyond question. Levin v. Union National Bank, 224 Md. 603, 168 A.2d 889 (1961); Davis Sand and Gravel Corp. v. Buckley, 231 Md. 370, 190 A.2d 531 (1963). Specifically, Appellee prays leave to clarify the following points:

(1) Admission of the sealed Bid Bond.

(2) Admission into evidence of the sealed Payment Bond and Performance Bond sections of the contract documents.

(3) Admission of a memorandum of law by the attorney, now deceased, Andrew B. Kingan, who actually signed and sealed this contract, indicating his intent and belief that his corporate seals operate to create a specialty.

(4) Such other extrinsic evidence of the intent of the parties as may be available.

(5) Correction of the erroneous testimony of Mr. Ifft at Appellee's appendix page 8 where he states "J. Pecora signed" when actually A. B. Kingan had signed and sealed the instrument.

(6) Introduction of all original contract documents last known to be in the custody of the Town of Federalsburg, or the Soil Conservation Service. The originals would remove the element of speculation now underlying and undermining the Court's present position.

(7) Further testimony on the tolling of the statute of limitations, particularly in regard to the meaning of the Contracting Officer's letters of October 21, 1968, and February 25, 1969.

(8) Admission into evidence of minutes of the meeting of February 19, 1969 in which the 1968 claim was acknowledged by the Contracting Officer's clear, distinct, and unqualified admission and acknowledgment of its continued pending status.

(9) Testimony by the Contracting Officer should be adduced to clarify his legal grounds for refusing to assume jurisdiction over this 1968 claim.

(10) Such other evidence as fairness and equity in this cause my require.

CONCLUSION

For the aforegoing reasons, the Appellee respectfully moves this Court to:

(a) Modify its opinion as above set forth; or, in the alternative,

(b) Grant a reargument, or, in the alternative,

(c) Stay the mandate and remand the case to the Trial Court for the taking of additional evidence as above set forth.

Respectfully submitted,

DATED _____

OWEN WISE
110 Market Street
Denton, Maryland 21629
Tel.: 479-1260

Attorney for the Appellee

CERTIFICATE OF SERVICE BY MAILING

I Hereby certify that on this 27th day of June, I mailed a copy of the foregoing motion for a modification to Starke M. Evans, Attorney for the Appellant, at 14 Morris Avenue, Federalsburg, Maryland 21632. Dated 1975.

OWEN WISE,
Attorney for Appellee.

DMTJr:g - 7/11/73

ALLIED CONTRACTORS, INC., Plaintiff	:	IN THE CIRCUIT COURT FOR
	:	QUEEN ANNE'S COUNTY
vs.	:	
MAYOR AND COUNCIL OF FEDERALSBURG, MARYLAND, Defendant	:	Law No. 3531
	:	

MEMORANDUM OPINION AND ORDER

In this case, Plaintiff, Allied Contractors, Inc., filed a three count suit against the Defendant, Mayor and Council of Federalsburg, Maryland, for money payable on a contract entered into by the parties for work on Defendant's Marshyhope Creek watershed project.

Defendant filed general issue pleas to each count and also plea of limitations stating that the cause of action did not accrue within three years before the filing of the action.

A hearing on the limitations plea was heard, in open Court, and counsel for the parties were also given the opportunity to file briefs on behalf of their respective clients. The briefs were filed by counsel and were of great assistance to the Court.

The President of the Plaintiff Allied Contractors, Inc., testified that they entered into a written contract with Defendant Mayor and Council of Federalsburg, Maryland, for reconstruction of two bridges and for slope protection work in the area. The piers were to be made deeper and the channel was to be widened and dug deeper for flood control and slope protection.

The testimony indicated that conditions encountered after work began were not anticipated when the agreement was reached and contract signed; those problems delayed the job and also necessitated extra work and materials for which the parties have been negotiating payment since completion of the work on or about 17 September 1968.

BEST COPY AVAILABLE

The following facts are considered relevant in ruling on the plea of limitations:

That there was a written contract under seal entered into between the parties; this agreement was dated July 28, 1967; it was executed and returned to the Defendant by the Plaintiff on August 8, 1967; work proceeded as scheduled until December 8, 1967, when it was stopped until December 20, 1967, Plaintiff claims pursuant to a stop-work order given by Defendant's contracting officer, Mr. John R. Hargreaves; Count II of Plaintiff's Amended Declaration is for the damages it claims it suffered as a result of this shutdown; also in December 1967, it was discovered that Pier #1 would require guniting above the 18" mark and this was done by the Plaintiff at about that time; Count III of Plaintiff's Amended Declaration is for the work done at that time; work was again stopped January 31, 1968, which stoppage Plaintiff claims was also pursuant to a stop-work order from Defendant's contracting officer, Mr. Hargreaves; Count IV of Plaintiff's Amended Declaration is for damages it claims it suffered as a result of this shutdown; the job was completed on or about September 17, 1968 and the Defendant notified the Plaintiff on or about September 28, 1968 that the work had been completed to its satisfaction; for the next few months after September 1968, there was considerable discussion and correspondence between the parties and others concerning measurements of quantities by Defendant and unresolved claims of the Plaintiff; March 4, 1969, Plaintiff received the proposed final estimate of Defendant's Contracting Officer for review by Plaintiff; Plaintiff did not accept or return the proposed final estimate since it omitted payment for certain claims of the Plaintiff, on which negotiations were in progress and continuing, and, on September 13, 1969, the Contracting Officer gave Plaintiff thirty (30) days within which to process the proposed final estimate or he would do so on a unilateral

basis; by letter of October 27, 1969, Contracting Officer wrote to Plaintiff and agreed to further discuss payment of the claim; finally, Plaintiff cashed the $11,823.37 check, which was dated November 6, 1969, with the endorsement that acceptance of the check did not constitute a waiver of claims, as outlined in its letter of September 26, 1969; the instant suit was filed March 2, 1972 and the Amended Declaration was filed on June 13, 1972.

The question for the Court at this time is whether on the facts and evidence now before the Court, Plaintiff's claims, or any one of them, are barred by limitations so as to require a dismissal thereof.

It appears to this Court from the evidence before it that Plaintiff's claim is not barred by limitations.

The first question which arises is what is the applicable period of limitations in this case.

The Plaintiff contends that the contract involved in this case is a contract under seal and is a specialty within the meaning of the statute and is therefore subject to a 12-year period of limitations. The contract speaks for itself as being a sealed instrument; however, Defendant's only witness also admitted (T. 15) that Plaintiff's seal was affixed to the contract. Maryland Law Encyclopedia, Limitations of Actions, Sec. 25, says, "Nevertheless the presence of a corporate seal on a contract, coupled with other circumstances surrounding the execution of the contract indicating an intention to constitute it a sealed instrument, had been held sufficient to constitute it a specialty within the meaning of the statute of limitations applicable to specialties." See General Petroleum Corp. v. Seaboard Term. Corp., 23 F. Sup. 137; also Conowingo Land Co. v. McGraw, 124 Md. 643, at pp. 646-647. See Art. 57, Sec. 3, Annotated Code of Maryland; Maltre v. Cunningham, 148 Md. 309; Ward v. Reder, Har. & McH. 145;

BEST COPY AVAILABLE

Sterling v. Reecher, 176 Md. 567.

It is the contention of the Defendant that the Plaintiff's suit is barred by the three-year statute of limitations, the contention of Defendant being that the statute of limitations began to run September 25, 1968, when Defendant finally accepted all the Plaintiff's work under the contract. Defendant contends that Plaintiff could have filed suit on September 17, 1968, as the contract payments were due at that time.

It appears to the Court that if the Defendant considered the contract complete on September 25, 1968, why did it not tender a final check with its letter of that date.

The contract in this case was a "unit price" agreement in which the Defendant was required to make measurements and quantity computations which were then used as a basis for submitting payment estimates to the Plaintiff. Until these computations are tendered to the Plaintiff, it is unable to determine or decide if it wants to argue, or sue, and if so, about what and for how much; and any attempt to do so, prior to such tender, would have been premature. In this case, the proposed final payment was not sent until February 1969, so it must be conceded that it would be difficult to conceive how limitations could begin to run in September 1968 on a claim which was not reduced to figures until February 1969.

It is very apparent to this Court that these parties have been negotiating both by letter and personal encounters concerning the balance due under the contract. It is true that the Plaintiff cashed Defendant's check for $11,823.37, which was dated November 6, 1969, having added, however, the endorsement that acceptance of the check did not constitute a waiver of their claims as outlined in its letter of September 26, 1969.

It should be kept in mind that what Defendant refers to as a "Final Payment Estimate" was in reality a "Proposed Final Payment Estimate", which difference "Plaintiff suggests is more

than one of semantics"; the Court agrees with this. It seems that the use of the word "proposed" indicates that the intent of the contract, if not also of the parties, was that submission of the estimate was merely another step in computing payment under the contract rather than the termination thereof. Even Defendant's own witness, Mr. Ifft, testified (T.11 and 12) that negotiations were conducted after this date on bills and claims pertaining to the contract, which contract Defendant now contends had then been completed. It is to be noted that on October 27, 1969, Contracting Officer, Mr. Hargreaves, wrote Plaintiff and agreed to further discussion of the claim.

The Court agrees that it is doubtful, in this case, from the evidence before it, if limitations has yet begun to run since there has yet to be a refusal by the Defendant to pay all the claims of Plaintiff. It seems that from the evidence Defendant was continuing to communicate with Plaintiff in such a way as to indicate an intention to pay the claims, the big question being when and which agency would ultimately be responsible for the cost of the work done.

The law as the Court understands it is that limitations begins to run where contracts are involved from the date of the alleged breach and the breach sued on in this case is the failure of Defendant to pay. Cotham & Maldonardo v. Board of County Commissioners for Prince George's County, Md., 260 Md. 556. Therefore, a pertinent inquiry is when did the Defendant fail to pay. It was stated in Joseph J. Hock v. Baltimore Contractors, Inc., 252 Md. 61 at page 68, citing Baltimore Co. Dept. of Education v. Henry A. Knott, Inc., 234 Md. 417, . . . "this seems to support the argument that there can be no acceptance until completion and there can be no completion so long as a portion of the contract price is held back to secure full performance." So, even assuming the project was completed, the contract would not be completed

BEST COPY AVAILABLE

until there was payment, or limitations cannot be said to run until there was a refusal of payment. The testimony shows (T.14 and 33) that the proposed final payment estimate was sent on February 24, 1969, for Plaintiff's review; but, it was not until over eight (8) months later that the check was sent by the Defendant, yet the Defendant now claims that the Plaintiff was dilatory and limitations has run.

Note the effect of the contracting officer's letter of October 27, 1969 (T. 41) which is some eleven (11) months after the work had been completed:

> "I will agree to a meeting with the State Roads Commission, Soil Conservation Commission, Zollman Associates, and other interested parties, and Allied Contractors, Inc., for the purpose of further discussion concerning this matter."

This is another clear indication that negotiations were still in progress as to the amount due Plaintiff under the contract.

It is to be noted further that the proposed final payment estimate was not received by Plaintiff until March 4, 1969 (T. 32) which is within the period of limitations, assuming they started to run when the "proposed payment" estimate was received by the Plaintiff for its review.

The action of the Court in holding that Plaintiff's claim is not barred by limitations is further sustained by the fact that from the uncontradicted testimony of Mr. Pecora, President of Plaintiff Allied Contractors, Inc., there were continuous meetings, correspondence and negotiations between the parties regarding unresolved issues arising out of the contract and work done thereunder (T. 36, 40, 41 and 42). Why would these meetings and negotiations continue if the contract were fully completed and nothing remained to be done?

The Defendant produced no testimony to show it unequivocally and categorically denied Plaintiff's claim more than three

(3) years ago, and, further, the evidence (T. 35 and 36) shows from previous experience Defendant's mere failure to pay was not evidence that payment would not be forthcoming. The Plaintiff had every reason to believe from Defendant's willingness to continue negotiations that Defendant was not irrevocably refusing to pay or denying liability.

It is the opinion of the Court that if the statute of limitations began to run more than three (3) years prior to the filing of suit it has been tolled for the reasons herein stated.

This Court also is of the opinion that this is not an appropriate case for interposition of a plea of limitations.

The Court agrees that the purpose of the plea of limitations is to protect against stale claims where "evidence has been lost, memories have failed and witnesses have disappeared". Feldman v. Granger, 255 Md. 289, at page 297. In the case of Foos v. Steinburg, 247 Md. 25 at page 38, the Court said "the plea of limitations is not looked upon favorably by the Courts and accordingly the rules governing it are to be strictly construed."

In view of the fact that the parties have been actively engaged in discussing and attempting to resolve the very claims sued up here without going to Court, it would not be fair at this time to defeat the Plaintiff's claim by the sustaining of the interposition of the plea of limitations, as a matter of law.

It Is Therefore ORDERED, this 12th day of July, 1973, by the Circuit Court for Queen Anne's County, that the Plea of Limitations filed herein by Defendant is DENIED.

B. Harlan Titus, Jr.
JUDGE

Filed July 12, 1973

TRUE COPY
TEST: [illegible] CLERK

Mayor
Lee E. James

Council
John R. Hargreaves
Allen M. Penrod
Kendall A. Moran
William H. Wheatley

OFFICE OF

Mayor and Council

OF FEDERALSBURG, MARYLAND

Clerk and Treasurer
Mrs. Mary E. Meredith

Corporation Counsel
Marvin H. Smith

September 19, 1969

JJ&S✓
Dean
Ent File
x4
x5
x6

Mr. J. Jay Pecora, President
Allied Contractors, Inc.
104 East Preston Street
Baltimore, Maryland 21202

Re: Contract MHC-1-67
Marshyhope Creek
Watershed

Dear Mr. Pecora:

In my letter dated February 25, 1969, I transmitted the final payment estimate for the above mentioned contract. You acknowledged receipt of this in your letter of April 10, 1969, and stated that you would reply to this matter under separate cover and in due course. As of this date, we have not received the reply so we have not been able to process this final estimate for payment.

If you do not return this estimate within thirty (30) days of the date you receive this correspondence with the release of claim block initiated, we will assume that you have accepted this estimate and will process it for final payment.

Very truly yours,

John R. Hargreaves
Contracting Officer

Replied by Allied's letter dated 9-26-69

JAMES H. NORRIS, JR.
CLERK

Court of Appeals
of Maryland

Courts of Appeal Building
Annapolis, Md. 21401

301-267-1541

JOSEPH L. DiSAIA
CHIEF DEPUTY

OLIVE JANE RICHARDS
VIRGINIA STEHLE HUBBARD
MARY J. MORRIS
DEPUTIES

July 17, 1975

J. Owen Wise, Esq.
Attorney at Law
110 Market Street
Denton, Maryland 21629

Re: Mayor and Council of Federalsburg,
Maryland v. Allied Contractors, Inc.
No. 156 - September Term, 1974

Dear Mr. Wise:

The Court has considered the motion for a reargument, etc. filed on July 3 in the above entitled case and has denied said motion on July 16, 1975.

The record is being returned to the Circuit Court for Queen Anne's County.

A copy of the mandate is enclosed.

Very truly yours,

James H. Norris, Jr.
Clerk

JHNjr/h
Encl.
cc: Starke Matthew Evans, Esq.

BEST COPY AVAILABLE

J. JAY PECORA
PRESIDENT
REG. PROFESSIONAL ENGINEER

H. K. BOLLINGER
SECRETARY

ANDREW B. KING, JR.
EXECUTIVE VICE-PRES., TREAS.
ATTORNEY

ALLIED CONTRACTORS
INC.

GENERAL CONTRACTORS

COMMERCIAL
INDUSTRIAL
PUBLIC WORKS

YARD: WARWICK AVE. AND BAKER ST.
AND W. M. R. R.
OFFICES: PRESTWAY BLDG., 204 E. PRESTON ST.
BALTIMORE, MD. 21202
Phone 539-6737

September 25, 1969

Mr. John R. Hargreaves
Contracting Officer
Office of Mayor and Council
Federalsburg, Maryland 21632

Re: Our contract 2432 X-4,
X-5, X-6
Contract MHC-1-67
Bridge Underpinning over
Marshyhope Creek
Federalsburg, Maryland

Dear Mr. Hargreeves:

Receipt is acknowledged of your letter of September 19, 1969 concerning the final payment estimate sent to us by your letter of February 25, 1969. Under separate cover we are returning this estimate to you unsigned since we have the following outstanding claims which are in the process of negotiation.

1. X-4 - Delay in contract on Highway Bridge stopping commencement of Phase II on account of design changes in adding treated sheetpiling (Submitted March 5, 1968) $7,354.24

2. X-5 - For gunniting Pier No. 1 286 square feet @ $32.00/s.f. $9,152.00

3. X-6 - Delay due to Stop Order No. 19 while Engineers are redesigning Piers 2 and 3. Work stopped from January 31, 1968 to April 8, 1968 (Submitted September 23, 1968) $57,516.42

J. JAY PECORA
PRESIDENT
REG. PROFESSIONAL ENGINEER

H. K. BOLLINGER
SECRETARY

ANDREW B. KING, JR.
EXECUTIVE VICE-PRES., TREAS.
ATTORNEY

ALLIED CONTRACTORS
INC.

GENERAL CONTRACTORS

COMMERCIAL
INDUSTRIAL
PUBLIC WORKS

YARD: WARWICK AVE. AND BAKER ST.
AND W. M. R. R.
OFFICES: PRESTWAY BLDG., 204 E. PRESTON ST.
BALTIMORE, MD. 21202
Phone 539-6737

We wish it clearly understood that we have not accepted this estimate nor have we waived any of our claims stated above.

Very truly yours,

ALLIED CONTRACTORS, INC.

J. Jay Pecora
President

JJP:mlk

BUILDING & ENGINEERING CONSTRUCTION

BEST COPY AVAILABLE